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No. 95-853

In The
Supreme Court of the United States

October Term, 1995

M.L.B.,

Petitioner

vs.

S.L.J., INDIVIDUALLY, AND AS NEXT FRIEND
OF THE MINOR CHILDREN S.L.J. AND M.L.J.,
AND HIS WIFE, J.P.J.,

Respondents

On Writ of Certiorari
To The Supreme Court of Mississippi

**BRIEF OF AMICI CURIAE NATIONAL CENTER FOR
YOUTH LAW, YOUTH LAW CENTER,
and NORTHWEST WOMEN'S LAW CENTER,
IN SUPPORT OF PETITIONER**

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici Curiae National Center for Youth Law, Youth Law Center, and Northwest Women's Law Center, non-profit public interest law organizations focusing on the rights of children and women, submit this brief with the consent of petitioner and respondents.¹

The question presented by this case implicates fundamental constitutional rights, not only of parents involved in proceedings to terminate parental rights, but also of the children whose lives are profoundly affected by termination proceedings. This *amicus* brief is submitted to urge the Court to take account of the constitutionally protected interests of children in deciding this case.

I. National Center for Youth Law

The National Center for Youth Law [NCYL] is a non-profit public interest law center, providing litigation support, technical assistance, and training to attorneys and other professionals on issues affecting low-income children and families. NCYL also engages in policy analysis, and administrative and legislative advocacy, on both state and national levels. NCYL's areas of expertise include foster care and protection of children from abuse and neglect, children's health and mental health, and public benefits. NCYL attorneys have served as lead counsel in two statewide class-action cases concerning reform of foster care. *Angela R. v. Clinton*, 999 F.2d 320 (8th Cir. 1993); *David C. v. Leavitt*, No. 93-C-206W (D.Ut., filed Feb. 25, 1993). NCYL has been involved in advocacy efforts focused on

¹ Written consents from petitioner's and respondents' counsel are on file with the Clerk of the Court.

procedural safeguards and due process for children and families involved in abuse/neglect, dependency and termination of parental rights proceedings, including *Lassiter v. Dep't of Social Services*, 452 U.S. 18, 102 S.Ct. 2153 (1981), *Davis v. Page*, 714 F.2d 512 (5th Cir. 1983), and *Cleaver v. Wilcox*, 499 F.2d 940 (9th Cir. 1974).

2. Youth Law Center

The Youth Law Center is a national, non-profit public interest law firm based in San Francisco, California. Founded in 1978, it has provided legal education, representation, and reform of laws relating to children and youth. For more than eighteen years, Youth Law Center attorneys have provided research, training, and technical assistance to public officials, attorneys and child advocates in virtually every state on legislation and public policy concerns involving juvenile justice, child welfare and children's health. The Youth Law Center has also represented children and youth in civil rights litigation in California and at least seventeen other states.

3. Northwest Women's Law Center

The Northwest Women's Law Center [NWLC] is a non-profit public interest organization dedicated to protecting the legal rights of women through litigation, education, legislation and the provision of legal information and referral services. Since its founding in 1978, NWLC has worked actively on all fronts to protect and advance the legal rights of women and children throughout Washington state and the Pacific Northwest. NWLC attorneys have represented women in numerous cases where the issue has been the right of access to the courts. Most recently NWLC filed an amicus brief urging the Montana Supreme Court to provide victims of sexual abuse access to the courts against all parties

responsible for their abuse. The Montana Supreme Court held for the plaintiff and issued a ruling that will help adult survivors of sexual abuse gain access to legal remedies. NWLC also has lobbied in Washington state and nationally for legislation to extend protection for domestic violence victims as well as for legislation that protects women's health and reproductive freedom. Furthermore, the Law Center has joined numerous amicus briefs to the United States Supreme Court on the issue of reproductive freedom.

SUMMARY OF ARGUMENT

In deciding whether provisions for *in forma pauperis* appeals of terminations of parental rights are constitutionally required, this Court should consider not only the fundamental rights of parents, but the fundamental rights of children to a parent-child relationship.

The basic procedural safeguard of an appeal is crucial to ensure the fairness and accuracy of termination proceedings, not only to protect parents from wrongful deprivation of their parental rights, but also to protect the children involved from a traumatic and irrevocable severing of their most intimate familial relationship when termination is not justified under the state's statutory standard. Thus, Mississippi's failure to make an appeal available in all cases, without regard to the parent's ability to pay, violates the children's as well as the parent's constitutional rights of due process.

Moreover, a rule such as Mississippi's, that conditions the right to appeal a termination of parental rights on the parent's ability to pay, is also constitutionally suspect on equal protection grounds. Mississippi, in effect, favors one class of children--those whose parents have enough money to pay the costs of appeal--with a safeguard against wrongful deprivation of their right to an ongoing parental relationship, and arbitrarily denies this safeguard to another class of children--those whose parents are indigent.

ARGUMENT

Provisions for *in forma pauperis* appeals of terminations of parental rights are necessary to protect the constitutional due process and equal protection rights of children, as well as parents.

An order granting termination of parental rights has far more drastic consequences for children than a court order governing the legal and physical custody of a child. Termination of parental rights permanently and irrevocably severs the child's rights to any future visitation, care, contact, or relationship with the parent. In most states, including Mississippi, termination ends the child's right to financial support from the parent, and the right to inherit upon the parent's death. As dramatically illustrated by the Chancery Court's order in this case, termination of parental rights would remove all traces of these children's mother from their lives -- even to the extent of removing her name from their birth certificates and replacing it with the name of their stepmother.

Thus, a termination of parental rights is the most extreme form of the state's exercise of its *parens patriae* power to intervene in familial relationships. When state intervention implicates fundamental rights of family integrity, for both children and parents, procedural safeguards to ensure fairness and guard against error are essential. *Santosky v. Kramer*, 455 U.S. 743, 102 S.Ct. 1388 (1982).

The drastic nature of termination of parental rights is highlighted in this case by the ages of the children involved and their custodial history. S.L.J. and M.L.J. (named after respondent and petitioner) were, respectively, nine and seven years old at the time of the Chancery Court's 1994 order

terminating their mother's parental rights. They had lived with their mother and father from birth until their parents' divorce in 1992. Thereafter, the children spent three months in their father's sole custody, and then about two years in the custody of their father and stepmother, before the termination petition was granted.

The Chancery Court made no findings regarding the nature of the relationship between petitioner and her children, or the consequences for the children of severing that relationship. It is very likely, however, that close emotional ties existed between petitioner and her children, and that the absolute and permanent severing of these ties has caused them emotional harm. Almost all children form intense bonds with their parents in the early years of development -- regardless of the adequacy or inadequacy of their parenting -- and children inevitably suffer some harm from severing these bonds, such as difficulty in forming attachments to future caregivers, and developmental and educational setbacks. *See, e.g.,* National Commission on Children, *Beyond Rhetoric: A New American Agenda for Children and Families* 282-283 (1991) [hereinafter *Beyond Rhetoric*]; American Bar Association, *America's Children at Risk*, 45-46 (1993).

Of course, in some cases the harms attendant upon severing a parent-child relationship are outweighed by the risks to the child of continuing that relationship, risks such as physical or sexual abuse. But the fact remains that termination of parental rights is a drastic step that should only be undertaken with clear and substantial justification, and that it involves a substantial deprivation of a child's fundamental rights and interests--material, developmental, and psychological--in preserving an existing parent-child relationship.

Recognizing the gravity of the interests at stake, Mississippi

has established that termination of parental rights may only be granted upon a showing, by clear and convincing evidence, of abandonment, abuse, or parental unfitness. Miss. Code Ann., Sections 93-15-103, 93-15-109.

Mississippi has also granted an appeal as of right to ensure that this standard is fairly and properly applied. Miss. Rules of Appellate Procedure, Rules 16, 17. Appellate review of termination cases is crucial, to ensure that children are not wrongfully deprived of their fundamental right to a parent-child relationship through error or bias in the trial court's application of the stringent legal standard for termination. Since children themselves have no right to representation by counsel in termination proceedings, or to appeal, the *only* protection of their fundamental rights is through the *parent's* right to appeal.

It is unfortunately common, as in this case, for children to be caught in the midst of bitter disputes between divorced parents. In this case, it appears that a major basis for the termination petition was an allegation that the mother had failed to maintain regular visitation. The mother, in turn, alleged that the father had unreasonably interfered with her visitation rights--an allegation that is not addressed at all in the Chancery Court's decision. Such highly contested evidentiary disputes are typical of termination of parental rights cases.

Moreover, the courts that adjudicate terminations of parental rights often work under intense time and caseload pressures. *See State Court Caseload Statistics: Annual Report 1991* (State Justice Institute, Feb. 1993); Carol R. Flango, *A Statistical View of the Divorce Caseload in the Nation's State Courts*, State Ct. J. 6-7 (Fall 1992); *Beyond Rhetoric*, at 283. Parties in termination of parental rights cases often appear without benefit of counsel, and the children themselves, in

many states including Mississippi, have no right to be heard or to representation by counsel, even though their fundamental rights are at stake.

The substantial danger of hasty and erroneous adjudications jeopardizing the fundamental rights of children is graphically illustrated by another recent Mississippi case, *Chrissy F. by Medley v. Mississippi Dep't of Public Welfare*, 780 F.Supp. 1104 (D.Miss. 1991), *aff'd in part*, 995 F.2d 595 (5th Cir. 1993). In this case, like petitioner's, the Mississippi Chancery Court was obliged to resolve a bitter dispute between parents over the custody of a child. The Chancery Court's handling of the case was so patently inadequate that the child ultimately sought relief through a civil rights action in federal district court. The district court, after trial, found that the Chancery Court and Youth Court judges had violated the child's constitutional right of access to the courts by conducting crucial proceedings without keeping any record or transcript of the proceedings, and without notifying the child's guardians ad litem, thus "subjecting [the child] to a proceeding which fell woefully short of those basic features which mark an adequate adjudicatory proceeding." *Id.*, at 1126-1127.

Given the substantial risks of error or inadequate adjudication at the trial court level, the safeguard of an appeal is crucial to protect the fundamental rights of children involved in termination of parental rights cases. Children should not, as a matter of constitutional due process, be deprived of this basic safeguard, simply because of their parent's inability to pay for transcripts and fees.

Also, under Mississippi law, while children whose parents can afford to pay for transcripts and fees have access to an appeal, children whose parents cannot afford these costs (here, the appeal costs were over \$2000) are arbitrarily

denied this basic procedural safeguard.

It is well established that treatment prejudicial to the interests of a class of children, based solely on the actions or characteristics of their parents, is constitutionally suspect on equal protection as well as due process grounds. *See, e.g., Plyler v. Doe*, 457 U.S. 189, 102 S.Ct. 2382 (1982); *King v. Smith*, 392 U.S. 309, 88 S.Ct. 2128 (1968).

CONCLUSION

This Court should hold that Mississippi's failure to make any provision for *in forma pauperis* appeals, in cases implicating the fundamental right of family integrity, violates the constitutional due process and equal protection rights of both the parents who are denied the opportunity to appeal, and the children whose most intimate and fundamental family relationship is severed forever, by the order of a single judge, with no chance for review, and no safeguard against error.

Respectfully Submitted

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